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Opinion of the United States Court of Appeals for the Tenth Circuit review of which is sought by writ of certiorari ____ 16

IN THE

Supreme Court of the United States

No. _____

L. E. RIFFE, *Petitioner*,

vs.

WILSHIRE OIL COMPANY OF TEXAS, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Comes now L. E. Riffe and respectfully petitions the Supreme Court of the United States for a writ of certiorari for review of the judgment of the United States Court of Appeals for the Tenth Circuit rendered in the case of Wilshire Oil Company of Texas, Appellant, versus L. E. Riffe, R. L. Felts, O. Homer Riffe, A. V. Murray and A. V. Murray, Inc., Appellees, on the appeal of the judgment entered in said case by the United States District Court for the Northern District of Oklahoma, and for such petition, states to the Court as follows:

I

REPORTS OF OPINIONS OF COURTS BELOW

This case, styled Wilshire Oil Company of Texas vs. L. E. Riffe, R. L. Felts, O. Homer Riffe, A. V. Murray and A. V. Murray, Inc., was numbered 8536 in the United States Court of Appeals for the Tenth Circuit. The opinion rendered by that Court has not yet been reported, officially or unofficially. A copy of that opinion is appended.

In the trial court, the United States District Court for the Northern District of Oklahoma, this case was styled as in the Circuit Court and was numbered 5861-Civil. The opinion rendered by that court has not been reported, officially or unofficially.

II

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals for the Tenth Circuit sought to be reviewed was entered on January 5, 1967, during the December 1966 Term of said Court, in accordance with the Court's opinion filed the same date.

Petitioner moved for an extension of time in which to file a petition for rehearing and said motion was granted, extending the time until February 9, 1967. A petition for rehearing was filed on February 8, 1967, which petition was denied by an order entered on March 24, 1967.

The statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254 (1).

III

QUESTION PRESENTED FOR REVIEW

Petitioner, who was an officer and director of Respondent corporation, became aware of a business opportunity which he disclosed and presented fully to the officers and directors of the corporation. The Respondent, acting through its directors, elected to seize and take advantage of the opportunity. Subsequently, Respondent reversed its decision and directed Petitioner to obtain the release of Respondent from all contractual obligations it had incurred with respect to the opportunity. Petitioner succeeded in obtaining a release as directed by Respondent. Was Petitioner thereafter free to take personal advantage of the opportunity without breaching his fiduciary and contractual duties to Respondent?

IV

CONSTITUTIONAL OR OTHER PROVISIONS OF LAW INVOLVED

This case involves no constitutional provisions, treaties, statutes, ordinances, or regulations.

V

STATEMENT OF THE CASE

Respondent, as plaintiff in the trial court, brought suit against Petitioner and other defendants no longer involved herein to recover damages and compensation on account of alleged breaches of contract and fiduciary duties.

On December 30, 1960, Respondent, by merger, acquired Riffe Petroleum Company, a closely-held corpora-

tion owned principally by Petitioner, which engaged in the marketing of asphalt and asphaltic materials. Subsequent to the merger, Riffe Petroleum Company continued substantially the same operations as a division of Respondent. Petitioner became executive vice president and a director of Respondent, his primary responsibility being the management of the Riffe Petroleum Company Division.

Petitioner was employed pursuant to a contract which provided in part:

> "(6) Employee agrees that so long as he is employed by the Company and for a period of three years after termination of such employment, he will not invest in, be employed by or work for any person, firm, corporation or entity competitive with the Riffe Division. For the purpose of this paragraph, membership in any partnership, syndicate or pool, or invesment in the stock of, employment by, or membership on the Board of Directors of, a competitor shall be a breach of the covenants contained in this paragraph. A competitor of the Riffe Division shall be deemed to include for the purpose of this Agreement any person, firm, corporation, pool, syndicate or entity engaged in purchasing and/or selling and/or producing asphaltic materials in any of the areas in which the Riffe Petroleum Company was engaged in purchasing and/or selling and/or producing asphaltic materials."

In late 1961, Petitioner became aware of an opportunity to construct and operate an asphalt manufacturing plant at Ponca City, Oklahoma. This plant would be constructed on land of Cities Service Petroleum Company and operated in conjunction with its refinery, utilizing refinery by-products in the manufacture of asphalt. Petitioner

negotiated a contract with Cities Service on behalf of Respondent for construction and operation of the asphalt plant and the supply of raw materials. This contract was approved and ratified by Respondent's board of directors and Petitioner proceeded with arrangements for construction.

Thereafter, Respondent changed its mind about owning and operating the plant and instructed Petitioner to extricate it from the contractual obligations that it had incurred. In order for him to accomplish that task, it was necessary for him to convince personal acquaintances of the attractiveness and soundness of the opportunity. These acquaintances then formed a corporation, Redstone Asphalt and Petroleum Company, to construct and operate the asphalt plant. Redstone thereafter negotiated and entered into a contract with Cities Service for construction and operation of the asphalt plant, which contract was substantially identical to the earlier contract between Respondent and Cities Service. As a condition to releasing Respondent from its contract, however, Cities Service required that Petitioner personally guarantee performance by Redstone of its contract. Petitioner then made this guaranty, in order to obtain the release of Respondent. Further, for Redstone to obtain the money needed to construct the plant, it was necessary for Petitioner to guarantee payment, to the extent of eighty per cent, of a loan in the amount of $274,000.00, which Redstone obtained from a Tulsa bank. Respondent was fully informed of these guarantees by Petitioner.

A. V. Murray, originally a defendant in this case, one of Petitioner's acquaintances who had formed the Redstone corporation, owned sixty per cent of the capital stock of the corporation. While the asphalt plant was in the process of construction, Mr. Murray sought to sell to Petitioner at his cost one-half of that stock and to give to Petitioner one-half of a commission he was to receive from the company building the plant, in appreciation of Petitioner's having brought the opportunity to his attention initially. Petitioner declined the gratuity.

Subsequently, Mr. Murray arranged for the transfer of the stock and commission to the trustees of irrevocable trusts which Petitioner and his wife had previously created for each of their six daughters. As found by the trial court, Petitioner had no control or direction over these trusts, directly or indirectly, and had no interest therein, other than as settlor and a normal paternal interest. The transfers to the trust were not pursuant to any agreement between Mr. Murray and Petitioner.

In September, 1962, the asphalt plant was completed and commenced production. In December of that year, all of the stock of Redstone corporation was sold to Inland, Inc., for approximately $112,000.00. For the thirty per cent of the stock owned by the trusts, $36,888.59 was received, resulting in a profit of approximately $28,000.00.

Respondent operated the Riffe Petroleum Company Division for a twenty-nine-month period and realized profits of approximately $400,000.00 before selling the division to another firm at an additional profit of $377,000.00.

Thereafter, in December, 1963, Respondent instituted this action, seeking, *inter alia*, to recover the profit made by the trusts on the sale of the Redstone stock and all compensation paid to Petitioner on the grounds that ownership of the stock by the trusts and other alleged misconduct on the part of Petitioner constituted breaches of his employment contract and fiduciary obligations to Respondent. Non-jury trial resulted in judgment for Petitioner and all other defendants on all of Respondent's claims, except one small claim, as to which the defendants confessed judgment. On appeal, the Circuit Court found that the transactions involving the asphalt plant and the stock of Redstone Asphalt and Petroleum Company constituted breaches of Petitioner's contractual and fiduciary duties to Respondent and remanded the case for determination of damages.

VI

BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

Jurisdiction of this case in the United States District Court for the Northern District of Oklahoma was founded on diversity of citizenship and amount. Respondent is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in Colorado. Petitioner and the other defendants in the trial court are all citizens and residents of the State of Oklahoma. The amount in controversy exceeds $10,000.00, exclusive of interest and costs.

VII

ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI

The opinion rendered by the United States Court of Appeals for the Tenth Circuit disregarded settled principles of law and reached a conclusion contradictory to the decisions of the court of another circuit and the courts of several states.

A myriad of judicial pronouncements has clearly defined the obligations which an officer or director owes to the corporation he serves in general and in many of the factual nuances that arise in active American business operations. The early decisions in this area of the law went no further than to apply the common-law rules relating to agents and principals, trustees and beneficiaries and masters and servants in reaching their conclusions. Since those early cases, however, the law has become so refined and developed that various facets thereof are now denominated and recognized by descriptive common names. The Circuit Court, in deciding this case, failed to recognize and acknowledge these developments. The "Corporate Opportunity Doctrine" is the name commonly applied to that phase of the law which delineates the obligation of a corporate officer or director when, because of his corporate position, he becomes cognizant of a business opportunity within the scope of the corporation's interest and which the corporation has the capability to exploit. It is the principles and precedents comprising this "doctrine" which are decisive and dispositive of the issues in this case.

For very sound reasons, a corporate officer is prohibited from clandestinely seizing and exploiting personally a business opportunity of which he has become aware by virtue of his corporate position, if the opportunity is one within the scope of the corporation's operation and interest. When such an opportunity comes to the attention of an officer (or a director or employee), he is obligated to disclose it honestly to his corporation. There are many cases establishing and enforcing this rule. Some of the typical ones are cited in the Circuit Court's opinion, for example: *Pratt* v. *Shell Petroleum Corporation*, 100 F. 2d 833 (10th Cir., 1939) and *Byer* v. *International Paper Company*, 314 F. 2d 831 (10th Cir., 1963). Those cases and their rationales are not apposite to the facts and issues involved herein, however, for it is uncontradicted that Petitioner satisfied all the obligations which those cases define. Having become aware of the opportunity to construct and operate the asphalt plant at Ponca City, Petitioner fully disclosed it to Respondent and urged Respondent to avail itself of the opportunity. When the opportunity was subsequently rejected, the issue in this case was presented. The issue herein—whether a corporate fiduciary may take personal advantage of a business opportunity which has been rejected by his corporation—is clearly distinguishable from the factual and legal issues presented in the precedents relied upon by the Circuit Court, since in none of those cases had the defendant fulfilled his duty to disclose and offer the opportunity to his corporation. The reliance upon those inapplicable authorities resulted in the erroneous decision which Petitioner seeks to have reviewed.

Prior decisions have considered and defined the freedoms and restrictions which apply to a corporate officer or director who wishes to avail himself personally of a business opportunity which has been rejected by his corporation. These decisions, which are a part of the body of law referred to above as the Corporate Opportunity Doctrine, were disregarded by the Circuit Court and, as a result, the opinion rendered is in conflict with the decisions of the court of another circuit and several of the states. The Circuit Court's disregard is exemplified by the statement in the penultimate paragraph of its opinion that ". . . we cannot say that the doctrine of 'corporate opportunity,' if this be a separate doctrine, is applicable . . .".

As early as 1910, the Circuit Court of Appeals for the Ninth Circuit had occasion to consider the situation of a corporate officer and director who personally and profitably seized a business opportunity after its rejection by the corporation. In that case, *Cowell* v. *McMillin*, 177 Fed. 25 (9th Cir., 1910), McMillin was president, general manager, a shareholder and a director of a corporation in Washington whose principal business was the sale of lime. The company required a large supply of wooden barrels for marketing its lime. It had constructed and operated its own plant for manufacturing barrels, which were produced at a cost of thirty-two cents each. The holder of a patent upon an improved barrel-making machine sought to persuade the corporation to license his machine, claiming that it would produce a better quality barrel at a lower cost. McMillin was strongly interested in obtaining the new machine and tried to persuade his fellow directors

to do so, just as Petitioner sought to convince Respondent's directors to construct the asphalt plant at Ponca City. In spite of McMillin's urging, the directors of the lime company declined to obtain the new machine.

So convinced was McMillin of the advantages of the machine that, following rejection by the corporation, he obtained for himself the license for its use. He then contracted to supply the lime company its requirements for barrels at thirty cents per barrel. The contract also permitted McMillin to use the barrel plant formerly operated by the lime company, its wharf, warehouses, etc. He was able to produce barrels at a cost of twenty-five cents each, including royalties paid to the patent holder. As a result of this contract, McMillin and a corporation he had formed to engage in the barrel business made substantial profits.

Cowell, a stockholder in the lime company, brought suit to require McMillin to account to the corporation for all profits made under the contract for the sale of barrels.

The Court found McMillin to have acted in good faith in his transactions, just as Petitioner was found by the trial court to have acted in good faith. It further noted that the company, having rejected the opportunity to have the machine itself, saved money over its former cost of producing barrels by purchasing them from McMillin. In the instant case, having rejected the opportunity to own and operate the asphalt plant, Respondent, nevertheless, profited from the contract which Petitioner was able to negotiate for the marketing of the plant's production.

Upon these facts, the Court found that McMillin was not required to account to the corporation for his profits from the barrel-making venture. The Court observed:

> "Thus, the case is brought within the rule recognized by the Supreme Court of the United States, namely, that where the director has acted with that candor and fairness which equity imposes as the guide for dealing between him and the corporation, and the transaction is open and free from blame, the director is not forbidden from making a contract with the corporation, or from entering upon a transaction in which he is personally interested. Twin Lick Oil Co. v. Marbury, 91 U.S. 587, 236 Ed. 328. See also, Marshall on Corporations, § 377; Figge v. Bergenthal, 130 Wis. 594, 109 N.W. 582, 110 N.W. 798; Barr v. Pittsburg Plate Glass Co., 57 Fed. 86, 6 C.C.A. 260." id at 39.

In a recent authoritative work, 6 Cavitch, *Business Organizations*, § 127.06 (5) (1964), the author, in discussing the Corporate Opportunity Doctrine, sets forth clearly the rules applicable to the issue in this case, as follows:

> "If an opportunity is in the corporate line of business, the director or officer to whom it is presented is under a duty to offer it to the board of directors for consideration. If the board rejects the proposition within a reasonable period of time, the director or officer may treat the opportunity as his own and the corporation should be barred from challenging his further action with respect to the opportunity. There are, however, a number of exceptions to this general rule, all of which are predicated on the corporation's disability or disinclination to pursue the opportunity, making disclosure unnecessary."

As judicial authority for the foregoing, the author cites *Cowell* v. *McMillin*, 177 Fed. 25 (9th Cir., 1910), dis-

cussed above, and *American Investment Co.* v. *Lichtenstein*, 134 F. Supp. 857 (ED MO., 1955). Other courts have also had occasion to consider the personal exploitation of a business opportunity by a corporate opportunity following its rejection by the corporation.

In *Little Rock Towel & Linen Supply Co.* v. *Independent Linen Service Co.*, 237 Ark. 877, 377 S.W. 2d 34 (1964), the plaintiff charged that one Bew, a former officer, had violated his fiduciary duties in personally seizing a business opportunity. The Court, noting prior rejection by the corporation, dismissed the complaint. Quoting from *Raines* v. *Toney*, 228 Ark. 1170, 313 S. W. 2d 802 (1958), the Court held:

> "This doctrine of 'Corporate Opportunity' is but one phase of the rule of undivided duty and loyalty on the part of corporate fiduciaries. It does not preclude a corporate fiduciary from engaging in a distinct enterprise of the same general class of business as that which the corporation is engaged in, so long as he acts in good faith."

The three defendants in *Lincoln Stores, Inc.* v. *Grant*, 309 Mass. 417, 34 N.E. 2d 704 (1941) were officers of the plaintiff corporation. Clandestinely they acquired ownership of a store in Norwich, Connecticut, which was only ninety feet from one of plaintiff's stores. When the plaintiff discovered what the defendants had done, suit was brought seeking, *inter alia*, to have a constructive trust

imposed upon ownership of the competing store. The Court, from a review of all the circumstances, concluded that, if the opportunity to acquire the store had been disclosed to plaintiff corporation, it would have been rejected. It held, therefore, that no wrong arose from acquisition of the competing store and refused to impose the trust sought by the plaintiff.

The courts and writers in the field have clearly recognized the right of a corporate officer or director to take personal advantage of a business opportunity after its rejection by the corporation. The Circuit Court, while questioning the existence of a Corporate Opportunity Doctrine, has, in this case, rendered an opinion, the import and effect of which is directly contradictory to the above-discussed decision of the Court of Appeals for the Ninth Circuit.

It is essential to the free and unfettered functioning of modern American corporate business that those involved be able to determine with reasonable certainty the course of action which may be pursued without exposure to undue risks of personal liability. This will be impossible if the opinion rendered by the Circuit Court is allowed to stand without review by this Court. No corporate fiduciary can know whether he may properly take advantage of a business opportunity rejected by his corporation, for the Ninth Circuit, several states and treatise writers have said that he may, while the Tenth Circuit has

said that he may not. Petitioner respectfully prays, therefore, that a writ of certiorari issue for review of the opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Tenth Circuit review of which is sought by writ of certiorari.

NOTE: The finding of fact, conclusions of law and judgment rendered by the United States District Court for the Northern District of Oklahoma upon trial of this case are contained in the certified transcript of the record in the United States Court of Appeals for the Tenth Circuit and may be found at pages 51-60 of Volume 1 of the Transcript of Record printed for the use of that Court.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Filed, United States Court of Appeals, Tenth Circuit Jan. 5, 1967. William L. Whittaker, Clerk.

Appeal From The United States District Court For The Northern District of Oklahoma.

No. 8536 — DECEMBER 1966 TERM

WILSHIRE OIL COMPANY OF TEXAS, Appellant,

vs.

L. E. RIFFE, R. L. FELTS, O. HOMER RIFFE, A. V. MURRAY, and A. V. MURRAY, INC., Appellees.

Richard H. Shaw, Denver, Colo. (Rodney O. McWhinney, Modesitt and Shaw, Denver, Colo., and Robert J. Woolsey, of Farmer, Woolsey, Flippo & Bailey, Tulsa, Okla., of counsel, with him on the Brief), for Appellant.

David M. Thornton, Tulsa, Okla. (Gerald G. Stamper, Tulsa, Okla., with him on the Brief), for Appellees.

Before PICKETT and SETH, Circuit Judges, and CHRISTENSEN, District Judge.

SETH, Circuit Judge.

This action was commenced by the appellant, Wilshire Oil Company of Texas, against certain of its former employees and a third party. The action sought damages, the recovery of compensation paid to the employees, and for an accounting of profits they allegedly made. The complaint asserted that the former employees engaged in activities which were contrary to their employment contracts and their fiduciary obligations to the company. It also asserts that the third party assisted the other defendants in their activities and was likewise liable.

The trial was had before the United States District Court for the Northern District of Oklahoma, and relief was denied. Appellant Wilshire has taken this appeal, asserting that certain findings of the trial court were not supported by the evidence and that there were errors of law.

The record shows that Wilshire obtained through a merger a company which had theretofore been owned principally by L. E. Riffe. This corporation, following the merger, became a division of Wilshire, but its officers and management continued very much as theretofore. L. E. Riffe became executive vice president of Wilshire and a director. He was in charge of the new division of Wilshire Oil Company which was known as the Riffe Division. Mr. Riffe was employed under a written contract of employment by which he agreed to devote his full business time

to the performance of his duties as an employee and officer of Wilshire, and he further agreed that he would not invest in, be employed by, or work for any other firm or corporation "competitive with the Riffe Division." The contract further provided that investment in the stock of a competitor would constitute a breach of the contract. Such a "competitor" was defined to include any firm or corporation engaged in "purchasing and/or selling and/or producing asphaltic materials in any of the areas in which the Riffe Petroleum Company was engaged in purchase and/or sale and/or producing asphaltic materials."

The record shows that the Riffe Division purchased asphalt from various oil refineries in Oklahoma and in Kansas and sold the product in Oklahoma and other nearby states.

At the end of 1961 L. E. Riffe negotiated and signed on behalf of Wilshire Oil Company a contract with Cities Service Petroleum Company for the construction of an asphalt plant. The agreement also provided that Cities Service would furnish raw materials, and Wilshire would sell the products. Wilshire thereafter decided not to proceed with the construction of the plant and directed Mr. Riffe to terminate the agreement. Mr. Riffe then advised several business men of the possibility of constructing the plant, and this group organized the Redstone Asphalt and Petroleum Company. A. V. Murray, a friend of Mr. Riffe, was one of this group, and he purchased sixty per cent of the corporate stock. Redstone thereafter negotiated further with Cities Service, and in June 1962 entered into a

new agreement for building the plant and sale of its output. Wilshire was thereby released from its contract with Cities Service. With the Redstone contract Mr. Riffe guaranteed that Redstone would perform for Cities Service, and he also guaranteed a portion of a bank loan made to Redstone.

In May 1962 Mr. Riffe signed an affidavit for Wilshire which purported to set out what his relationship with Redstone was and would be. In this affidavit he stated that his only interest in the Redstone-Cities Service contract would be as a guarantor. He further stated that he was not a stockholder of Redstone nor had any arrangements whereby he would receive any profits which Redstone might receive under its contract with Cities Service. In this affidavit he further stated his only interest in Redstone "monetarily or otherwise, is as a guarantor of Redstone's contract with Cities Service and its loan secured for the construction and equipment of an asphalt plant. . . ." He further stated in the affidavit that he would not do anything nor permit anything to be done by reason of his guarantee of Redstone's obligations which would "jeopardize, interfere, or restrict in any manner whatsoever, his duties to Riffe Petroleum Company, a division of Wilshire, and that he shall continue to faithfully and diligently perform such duties required of him as an officer, director and stockholder of Wilshire."

The plant construction by Redstone was delayed and meanwhile it purchased asphalt for sale to its customers from Wilshire at a reduced price. It was apparent that Redstone was intended to be a competitor of Wilshire and

would become such competitor when it first commenced the sale of asphalt to its customers.

At the end of May 1962 Mr. Riffe and his wife executed six trust instruments, creating separate trusts for each of their young daughters. The two trustees at the time the trusts commenced were O. Homer Riffe who was a brother of Mr. Riffe, and the other was an attorney of Mr. Riffe. The trust instruments recited that Mr. Riffe and his wife thereby transferred to the trusts the properties which were listed on schedule A attached to the trust. This first schedule was apparently prepared about the time the trusts were created. On this schedule are listed, for each of the six trusts, 150 shares of Redstone stock; an undivided interest in a note of Universal Asphalt Company, which is also in issue here; an interest in a commission contract between A. V. Murray and the corporation which constructed the asphalt plant, in issue in this case; and in addition, oil and gas leaseholds, royalties, and other interests.

The six trusts according to the schedules attacted to each thus held in May 1962 thirty per cent of the total issued and outstanding stock of Redstone. The record also shows that Wilshire had no knowledge of the fact that these stocks were in the family trusts of Mr. Riffe.

The record is not entirely clear as to why these shares of Redstone were transferred to the trusts, but it shows that they were transferred by Mr. A. V. Murray from the shares he held in Redstone. The court found that in July 1962 Mr. Murray attempted to sell one-half of his stock

of Redstone to Mr. Riffe at a price equivalent to Mr. Murray's cost. The court found also that Mr. Riffe rejected this offer and informed Mr. Murray that his employment contract with Wilshire prohibited him from owning such stock. The court further found that Mr. Murray thereafter, "voluntarily and without demand by L. E. Riffe, . . ." transferred the stock to the six trusts for the Riffe daughters and likewise assigned one-half of his interest in the commission for the construction of the Redstone plant. The court found that the transfer of stock was not in accordance with any previous arrangement between the parties, and that Mr. Murray made the transfers ". . . to express his appreciation to L. E. Riffe for affording A. V. Murray an opportunity to invest in Redstone. . . ." The trust schedule relating to the Redstone stock contained a recitation that the transfer was "subject to payment of $9,000.00 to A. V. Murray for costs of stock." In connection with the transfer of this stock to the trust, Mr. Murray dealt with the attorney for the bank which about a year later became a trustee, and he negotiated the transfer with this person.

The record shows that from the time after Redstone contracted with Cities Service, Mr. Riffe participated in negotiations and made contacts relative to the possible sale of Redstone.

By a written representation dated November 1, 1962, Mr. Riffe stated to Wilshire that neither he nor any relative owned ten per cent or more of the stock of any company engaged in a similar line of business as Wilshire. At the time that this representation was made, the Redstone,

stock was owned by his daughters' trusts. Some time thereafter, and apparently in December 1962, the Redstone stock held by the trusts was sold to Inland, Inc. It appears that all of the outstanding Redstone stock was sold at that time. The purchaser of this stock required as a condition of its purchase of the entire stock that there be a marketing contract whereby the Riffe Division would market the production of asphalt from the refinery formerly of Redstone.

Thereafter new schedules A were attached to the trusts of the Riffe children, and a bank became one of the trustees. This new schedule does not show ownership of the Redstone stock, but instead shows ownership of all or part of the purchase price therefor, together with other checks and property hereinafter discussed.

The trial court found that the trusts were irrevocable and were not under the control and direction of Mr. Riffe.

The record thus shows that the Redstone stock was stock in a competitive corporation. The record further shows that Mr. Riffe maintained contact with this competitive corporation and participated from time to time in negotiations concerning it. Had he owned this stock directly, there would be no question but what such ownership would constitute a violation of his employment contract and of his fiduciary position as an officer and director of Wilshire. The appellant urges that the fact that the stock was held in trust would make no difference because Mr. Riffe could not accomplish indirectly what he is prohibited from doing directly. Further the owner-

ship of such stock by the trusts was contrary to the representations which he made on November 1, 1962, and was likewise contrary to the affidavit which he executed in May 1962.

The Appellees on the other hand urge that the court found that the trusts were irrevocable, found that Mr. Riffe did not control the trusts, and that therefore there was no breach of contract or violation of fiduciary duty.

It appears that in an analysis of the duties of Mr. Riffe and the facts of this case, his obligations arising under his employment contract as they relate to participation in competitive corporations and his fiduciary duties as an officer and director are very much the same. The employment contract is perhaps made more specific by the subsequent affidavits and representations made by Mr. Riffe, thus the basic question presented is whether or not the fact that the trusts owned the shares of stock in Redstone insulated Mr. Riffe from liability under his employment contract or from any liability for breach of his fiduciary duties. There is no question but what the ownership of the Redstone stock by the trusts was not known by Wilshire, and in fact was so held contrary to the representations made by Mr. Riffe in November 1962.

The courts have had many opportunities to consider the duties which are owed by an officer and director to a corporation as related to the personal interests of such an officer or of members of his family. There is no question that a person in the position of Mr. Riffe in this case, both under his contract and as an officer and director,

owed a duty to Wilshire to act in the utmost good faith. As a director and officer of Wilshire he occupied a fiduciary position relative to the stockholders and the corporation. Dunnett v. Arn, 71 F. 2d 912 (10th Cir.). A corporation is entitled to have its officers and directors actively promote its interests, and not to place themselves in a position where their personal interests conflict, or could conflict, with those of the corporation.

Mr. Riffe in his capacity as an officer of Wilshire, and as directed by a corporate decision, undertook to procure the release of the corporation from the contract with Cities Service. This was a difficult task, and was accomplished by inducing others to organize and substitute another company for Wilshire. These several business men organized Redstone for this purpose, and with some personal guarantees by Mr. Riffe, the desired result was accomplished. The personal involvement of Mr. Riffe, by way of his personal undertakings, was of course beyond his obligations to the company, and there is no evidence that they were in any way contemplated by the company in its direction to secure a release.

Shares of stock in Redstone then were offered for sale at cost by one of its organizers, Mr. Murray, to Mr. Riffe but were refused by him because of his employment contract. The shares were then transferred instead to the trusts he had created about this same time for his children. The trial court found this transfer to have been made by Mr. Murray ". . . to express his appreciation to L. E. Riffe for affording A. V. Murray the opportunity to invest

in Redstone. . . ." The negotiation of the contract with Cities Service was done by Mr. Riffe as was Wilshire's release. All of this was clearly a corporate activity, and any benefits arising from it should not inure to the personal benefit of Mr. Riffe.

The record shows and the trial court found that Mr. Riffe rejected the offer of the stock to him directly because of his employment contract with Wilshire, yet there was accomplished indirectly what could not be done directly. The shares were transferred to the trusts for his children. These shares represented a personal benefit derived from a corporate transaction, and in view of the findings it is clear they were conferred on the trusts instead of on Mr. Riffe directly. This constituted a violation of his fiduciary duty as an officer and director to the corporation as well as a violation of his contract with it. The trial court was in error in its conclusions drawn from the findings of fact.

Certainly the duty of the director and officer here concerned can be no less than that of the employees considered by this court in Byer v. International Paper Co., 314 F.2d 831 (10th Cir.), where it was held that the employee ". . . is bound to a high degree of good faith toward his employer, and is not entitled to avail himself of any advantage that his position may give him to profit at the employer's expense beyond the terms of the employment agreement." Nor is it less than that considered in Pratt v. Shell Petroleum Corp., 100 F.2d 833 (10th Cir.).

The basic principle applicable to the facts at hand is well stated in the following quotation:

> "Since the directors and other officers of a corporation whatever their relation may be technically, occupy a fiduciary or quasi trust relation toward the corporation and the stockholders collectively, it is thoroughly well settled that they cannot, either directly or indirectly, in their dealings on behalf of the corporation with others, or in any other transaction in which they are under a duty to guard the interests of the corporation, make any profit, or acquire any other personal benefit or advantage, not also enjoyed by the other stockholders, . . ." 3 Fletcher Cyclopedia of Corporations 284 (perm. ed. 1965 rev. vol.).

In the above two quoted cases from this circuit, it was also held that no showing of damage to the corporation need be made when the facts demonstrate the creation of a situation which lent inducement or temptation for wrong-doing. Pratt v. Shell Petroleum Corp., supra; Byer v. International Paper Co., supra.

The element of secrecy is clearly present as the record shows that Wilshire did not know of the ownership of the Redstone stock by the trusts. In fact, the record shows that Mr. Riffe represented in writing to the corporation that none of his family owned directly or indirectly more than ten per cent of the shares of a competing company.

The trial court concluded that Mr. Riffe acted in good faith, but this does not affect his liability. Alvest, Inc. v. Superior Oil Corp., 398 P.2d 213; 3 Fletcher Cyclopedia of Corporations § 888 (perm. ed., 1965 rev. vol.). Again the showing that he created a situation where his personal

interest came in conflict with that of the corporation was sufficient to show a breach of trust.

The trial court found these trusts to be irrevocable and not to be controlled by Mr. Riffe, but it is apparent that they were created at a critical time during the contract termination negotiations and the initial assets placed in them included the shares of stock in question and other assets also in issue here arising from the same transaction. Any increase in the assets of these trusts benefitted Mr. Riffe's family as a whole and benefitted him indirectly. He sought to accomplish by the trusts what he could not do directly. Thus assuming the trusts were valid they did not insulate him from liability for the breach of his fiduciary duty to the corporation. In Knox Glass Bottle Co. v. Underwood, 89 So. 2d 799, the court considered facts somewhat similar to the ones before us except the legal principle concerned dealt with the corporation. The court there held liable the trustees of children of the officer-director for profits made in violation of fiduciary duties. The benefit inured to Mr. Riffe, and no issue of a constructive trust to be imposed on the trust assets is here presented.

We do not propose to treat at any length the burden which is placed upon a person in Mr. Riffe's position when the initial showing was made during the course of the trial that a possible breach of fiduciary duty had occurred. It is clear under these circumstances that an officer or director has the burden of fully explaining such a transaction and of showing its propriety. Geddes v. Anaconda

Mining Co., 254 U.S. 590. The burden is certainly on the director or officer who buys property from the corporation to prove good faith in the sale, and its fairness to the corporation. Annot., 24 A.L.R.2d 89. The same rule must be applied to the situation presented here. Perlman v. Feldmann, 219 F. 2d 173 (2d Cir); Mattingly v. Sisler, 175 P. 2d 796; Owens v. Musselman, 121 P. 2d 998; Looney v. Chastain, 395 P. 2d 571. No choice of law issue has been raised and there would seem to be no need to since the rule in its basic form appears to be universally applied.

As we have above indicated Redstone was competitive with Wilshire during at least a portion of the time in issue. This together with the undisputed ownership of thirty per cent of its stock by the Riffe trusts also constitutes a breach of the employment contract between Mr. Riffe and Wilshire.

The Anco Commission:

As indicated above there was also placed in the trusts money from Mr. Murray which was identified as one-half of the commission paid to Mr. Murray by Anco Manufacturing Company which built the asphalt plant for Redstone. This commission was known to Mr. Riffe, and the trial court found that this money was also offered to Mr. Riffe directly but he rejected it because of his contract with Wilshire. The court also found that this money was so offered by Mr. Murray to express his appreciation for the opportunity to invest in Redstone. The money was thereafter paid to the trusts created for the Riffe children.

This money falls in the same category as the stock in Redstone. It was a profit obtained out of a transaction with or in connection with a competitor. The trust schedule shows that this money was in payment for Mr. Riffe's guarantee of the Redstone bank loan. A memorandum of one of the trustees states it was money Mr. Murray had received on behalf of Mr. Riffe. It was treated by the payor for tax purposes as an expense. Thus the exact reason why the money was paid in to the trusts is not clear, but the record shows it inured to the benefit of Mr. Riffe without the knowledge of Wilshire and was a violation of his fiduciary duties. Mr. Riffe had the burden to demonstrate propriety and the fairness of the transaction and he failed to do so.

Universal Asphalt Company:

Mr. Riffe invested, through his children's trusts, in Universal Asphalt Company, and took back an agreement whereby the trusts would receive a percentage of Universal's net profits. This corporation was owned by Mr. Thomas J. Masterson who was a salesman, apparently not full time, for Wilshire. Under his employment contract Mr. Masterson was permitted to operate this company engaged also in the sale of asphalt. He testified that the product he sold was not handled by Wilshire and that the two corporations were not competitive. The trial court weighed the evidence and apparently found there was no competition. It considered the fact that Wilshire had permitted Masterson to engage in the business, although under a somewhat different employment contract. The evidence was at best contradictory on the competition issue

and the trial court's finding was supported by substantial evidence. This being the finding, it cannot be said that in this regard Mr. Riffe violated his employment contract nor violated his fiduciary duty.

The record shows that the Riffe Division paid what are referred to in the record as "commissions" to the wives of certain employees of Owens-Corning Fiberglass Company, in order to make sales of asphalt to that company. This arrangement apparently lasted about a year and a half. For each ton of asphalt purchased by Owens-Corning the record shows that the wives of certain of its officials received a commission. There is evidence however that these payments were made known to the then treasurer of Wilshire after having been noted in detail, including names and purpose, during the course of an audit. Since the payments were so known, the appellant cannot recover against the appellees.

The remaining issues pertaining to Mr. L. E. Riffe and the other appellees and the creation of Riffe Industries has been considered, but we cannot say that the doctrine of "corporate opportunity," if this be a separate doctrine, is applicable, nor does the record support a cause of action based on ordinary trust or contract principles.

The case is REVERSED and REMANDED for further proceedings in accordance with this opinion.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 184

L. E. RIFFE, *Petitioner*

v.

WILSHIRE OIL COMPANY OF TEXAS, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Wilshire believes that the Statement of the Case presented in Petitioner Riffe's Petition should be expanded with the addition of certain important details, helpful to an understanding of this case.

Therefore, adding to what appears on pages 3 to 7, inclusive, of the Petition, Respondent Wilshire states as follows:

In May, 1962, Petitioner Riffe executed an affidavit for Respondent Wilshire which purported to set out what his relationship with Redstone was and what it was expected

to be in the future. He stated in the said affidavit that his only interest in the Redstone-Cities Service contract would be as a guarantor. He further stated that he was not a stockholder of Redstone, nor did he have any arrangements whereby he would receive any of the profits which Redstone might receive under its agreement with Cities Service. He further stated in the affidavit that his only interest in Redstone "monetarily or otherwise, is as a guarantor of Redstone's contract with Cities Service and its loan secured for the construction and equipment of an asphalt plant. . . ." He went on in the affidavit to aver that he would not do anything nor permit anything to be done by reason of his guarantee of Redstone's obligations which would in anyway "jeopardize, interfere, or restrict in any manner whatsoever, his duties to Riffe Petroleum Company, a division of Wilshire, and that he shall continue to faithfully and diligently perform such duties required of him as an officer, director and stockholder of Wilshire." (Record, 67, 304, 305)

The plant construction by Redstone was delayed (during year 1962), but it purchased asphalt for sale to its customers from Wilshire at a reduced price; arranged for it by Petitioner Riffe (R. page 110). As the United States Court of Appeals for the Tenth Circuit observed in its Opinion and Decision (page 19, Appendix to Petitioner Riffe's Petition), "It was apparent that Redstone was intended to be a competitor of Wilshire and would become such competitor when it first commenced the sale of asphalt to its customers."

A. THE RIFFE TRUSTS

Near the end of May, 1962, Petitioner Riffe and his wife executed six separate trust instruments, creating a separate trust for each of their six daughters, respectively. The two trustees at the time the trusts were first created were O. Homer Riffe, a brother of Petitioner Riffe, and David Thorn-

ton, Mr. Riffe's attorney (and still his attorney in this case). The trust instruments recited that Petitioner Riffe and his wife had transferred to the trusts certain properties listed on Schedule A, attached to the trust instruments. The record indicates that the first schedule was apparently prepared about the time the trusts were created in May, 1962. On this schedule are listed, for each of the six trusts, 150 shares of Redstone stock; an interest in a commission contract between another defendant in this action, A. V. Murray, and Anco Manufacturing Company (which constructed the asphalt plant); and, in addition, certain other properties and interests, which are not any longer an issue in this case. (R. 143-149, 320-322)

The six trusts collectively held 30% of the total issued and outstanding stock of Redstone. The record also shows that Wilshire had no knowledge of the fact that these stocks were in the family trusts of Mr. Riffe, the Petitioner herein.

As stated in Petitioner's Statement of the Case, the said stock found its way into the trusts by reason of a sale by A. V. Murray, a previous defendant, of the said stock to the trustees. In connection with the transfer of the stock to the trusts, A. V. Murray dealt with an attorney for a certain bank in Tulsa, which became a trustee of the trusts about a year later (1963) (R. pages 143, 146, 239, 245). The record shows that Petitioner Riffe participated in negotiations and made various contacts relative to the possible sale of Redstone from and after the time Redstone made its contract with Cities Service (R. pages 246-249, 201-203).

By a written representation dated November 1, 1962, Petitioner Riffe unequivocally stated to Respondent Wilshire that neither he nor any relative owned 10% or more of the stock of any company engaged in a similar line of business as Wilshire. This statement was made at the same time that 30% of the Redstone stock was owned by Peti-

tioner Riffe's daughters' trusts (R. pages 333-335). The statement was made despite the existence of Petitioner Riffe's employment contract with Wilshire (R. pages 18-21); (Petitioner's Petition, page 4). The record further shows that some time after the written representation of November 1, 1962 and apparently in December, 1962, the Redstone stock held by the Riffe Trusts was sold to Inland, Inc., along with all the rest of the stock in Redstone. The company purchasing the said stock required, as a condition of its purchase of the entire stock, that there be a marketing agreement whereby the Riffe Division of Respondent Wilshire would be compelled to market the production of asphalt from the refinery which was built and owned by Redstone and subsequently sold to the said purchaser (Inland, Inc.) (R. pages 36, 43). Petitioner Riffe negotiated and bound Respondent Wilshire to such a marketing agreement.

Thereafter, new schedules were attached to the trusts of Petitioner Riffe's children, and a Tulsa bank became one of the new trustees. The new schedules showed ownership of proceeds received in the sale of the Redstone stock to Inland, Inc., together with other properties and interests, including proceeds from a commission (mentioned below) received by A. V. Murray from Anco Manufacturing Company for recommending Anco to construct the Redstone refinery (R. pages 322, 324, 325).

B. THE ANCO COMMISSION

In addition to the Redstone stock which found its way into Petitioner Riffe's trusts in 1962, A. V. Murray (a co-defendant with Riffe in the trial of this action) caused to be given to the Riffe trusts one-half of a commission which he had secretly obtained from the Anco Manufacturing Company because of recommending Anco to construct the Redstone refinery in Ponca City, Oklahoma. The commission

was in the amount of $16,050.00, and Murray gave exactly one-half, or $8,025.00, to Petitioner Riffe's trusts for his children (R. 238). The record shows that Petitioner Riffe was fully aware of this fact. The fact was not disclosed in any way to Respondent Wilshire, or its officers or directors (R. pages 304, 333). A. V. Murray and R. L. Felts (co-defendants of Petitioner Riffe at trial) admitted that Redstone was a competitor in the asphalt business with Respondent Wilshire from the time it was created until and after the time it was sold to Inland, Inc. (R. pages 118, 119, 99-143, incl.; 207-250, incl.).

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioner Riffe, through his counsel, claims that this court should allow his Petition for a Writ of Certiorari upon a single ground only, to wit:

That the United States Court of Appeals for the Tenth Circuit has reached a conclusion in this case contrary to a decision of the United States Court of Appeals for the Ninth Circuit (e.g. *Cowell v. McMillin, et al.*, 177 Fed. 25; CCA, 9th (1910)).

Petitioner Riffe admits on page 3 of his Petition that this case does not involve any constitutional provisions, treaties, statutes, ordinances, or regulations. Apparently, Petitioner Riffe is attempting to invoke the jurisdiction of this Court under the provisions of Supreme Court Rule 19(b), as to that part which reads: "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . ."

Unfortunately for Petitioner Riffe, there is no conflict between the Ninth and Tenth Circuits with respect to the subject matter of the instant case.

Respondent Wilshire desires to state at the outset that it

agrees thoroughly with the holding in the Ninth Circuit decision in *Cowell v. McMillin,* et al., 177 Fed. 25 (1910), upon which Petitioner Riffe relies. *Cowell v. McMillin* has not been cited in any decision since 1953 (see Volume 2, Shepard's Citations), but it announces basic and settled law with respect to the fact situation involved in that case.

The fact situation in *Cowell v. McMillin* is completely different from the fact situation in the case at bar. Petitioner Riffe's reliance upon a so-called "corporate opportunity doctrine" cannot rescue him from the holding of the Tenth Circuit that Petitioner Riffe not only violated the plain terms of his employment contract with Respondent Wilshire, but he also violated his fiduciary and other duties as an officer and director of Wilshire. Actually, the corporate opportunity doctrine has little or nothing to do with the reasoning and conclusions of the decision in this case entered by USCA, 10th, below.

The main distinction in the facts as between *Cowell v. McMillin* on the one hand and the case at bar on the other is that of secrecy. A second distinction is that Redstone was a competitor of Respondent Wilshire; the element of competition was lacking in the facts of *Cowell v. McMillin.*

In *Cowell v. McMillin,* the principal defendant, McMillin, dealt with his company strictly in the open. Moreover, he entered into written agreements with his company which had definite long-term benefits for the company, and which involved another company which was not in any way a competitor of the first company. In the instant case, Petitioner Riffe dealt only in secret, never revealing his direct and indirect ownership of Redstone Asphalt and Petroleum Company to Respondent Wilshire, and, in fact, making written representations by affidavit and otherwise in May and in December, 1962 that he did not have any monetary or other interests through himself or through relatives. Moreover, the record shows, as set forth in the Statement of the

Case herein, that Redstone from the time of its creation was a competitor of Respondent Wilshire. The record further shows that Petitioner Riffe, though a top officer and director of Respondent Wilshire, did everything he could to nurture the growth of his company's competitor, Redstone, all for his ultimate benefit and profit, clandestinely realized.

Petitioner Riffe maintained a constant contact with the competitive corporation, Redstone, and participated from time to time in negotiations concerning its business and its ultimate sale to Inland, Inc. He even participated in other potential sales to other companies, which did not materialize (R. pages 201-203).

Petitioner Riffe has maintained throughout this case that he did not have a personal interest in Redstone, but rather that six "irrevocable" trusts were established by him and his wife for their six daughters, and that the trusts held the interests.

Had Petitioner Riffe owned the Redstone stock directly in his name, there would be no question, as the Tenth Circuit observed, that such ownership would constitute a violation of his employment contract and of his fiduciary position as an officer and director of Respondent Wilshire. It makes no difference that the stock was held in some kind of family trusts. Petitioner Riffe should not be able to accomplish indirectly what he was plainly prohibited by his employment contract and by reasons of his position as director and officer from doing directly. In any event, the ownership of the stock by the trusts was contrary to the affidavit he executed in May, 1962 and the written representations made by him on November 1, 1962. Even assuming that the trusts were valid, and in fact were irrevocable as Petitioner Riffe claims, they did not insulate him from liability for the breach of his fiduciary duty to the Respondent Wilshire corporation. (See *Knox Glass Bottle Co. v. Underwood*, 89 So.2d 799.)

Among other decisions, USCA, 10th Cir. in this case applied *Byer v. International Paper Co.*, 314 F.2d 831 (10th Cir.) and *Pratt v. Shell Petroleum Corp.*, 100 F.2d 833 (10th Cir.) to the facts in this case. Both the *Byer* and the *Pratt* cases should be determinative of the issues presented herein.

In contrast to the clandestine and wrongful acts committed by Petitioner Riffe as against Respondent Wilshire, let us look at the essential facts of *Cowell v. McMillin*, upon which Petitioner Riffe relies. The opinion in the case is somewhat lengthy, but the contrast between it and *Riffe v. Wilshire* can easily be shown by a succinct reference to its facts. They are as follows:

Defendant McMillin was president, general manager and a director of a lime company in the state of Washington. The principal facts arose in the years commencing in about 1890, and thereafter. Defendant McMillin contracted individually for the exclusive license in the State of Washington of a patented barrel-making machine. This was done with the knowledge and consent first given by the lime company and its directors. The lime company, by unanimous vote of the other directors, Defendant McMillin not voting, leased the lime company's barrel-making plant, and contracted with McMillin to furnish all the barrels required in its business at a stated price. Defendant McMillin installed one of the patented machines in the plant, and by a written agreement, renewed from time to time, furnished barrels to the lime company for a number of years at a profit. Defendant McMillin did not, at the time of the original contract for furnishing barrels, own a controlling interest in the lime company nor did he control the other directors, each of whom owned a considerable amount of stock. Moreover, the patented machine was first offered to the lime company, was discussed by its directors and Defendant McMillin strongly urged that the lime company secure the

license for the said machine. The other directors were doubtful about the effectiveness of the machine, and refused to risk the lime company's money for the experiment. They did acquiesce, with full knowledge, in the acquisition of the license to use the patented barrel-making machine by Defendant McMillin. At the time they entered into the contract with Defendant McMillin to furnish barrels for the lime company, the directors had as much knowledge about the patented machine as Defendant McMillin did; but they did not share his confidence in its successful operation. The contract price of the barrels furnished by Defendant McMillin to the lime company was less than the average cost for barrels previously paid by the company.

The Court in *Cowell v. McMillin* held that under such facts, recited above, the contract and lease involving Defendant McMillin for making barrels for the lime company, were not fraudulent nor illegal, but fair and valid. The Court said at page 39 of 177 Federal Reporter:

> "Thus, the case is brought within the rule recognized by the Supreme Court of the United States, namely, that where the director has acted with that candor and fairness which equity imposes as the guide for dealing between him and the corporation, and the transaction is open and free from blame, the director is not forbidden from making a contract with the corporation, or from entering upon a transaction in which he is personally interested. Twin Lick Oil Co. v. Marbury, 91 U.S. 587, 23 L.Ed. 328."

We repeat. Respondent Wilshire and its counsel are in full accord with the holding in *Cowell v. McMillin*. It is obvious from the contrast of the facts, as between *Cowell v. McMillin* on the one hand and this case of Riffe v. Wilshire on the other, that the *Cowell* case has no applicability to the "Question Presented For Review" on page 3 of Petitioner Riffe's Petition.

It is obvious also that Petitioner Riffe should not be permitted to invoke the jurisdiction of the Supreme Court of the United States under the provisions of Supreme Court Rule 19(b).

CONCLUSION

Respondent Wilshire respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Moreover, Respondent Wilshire prays that this Honorable Court adjudge to Respondent reasonable damages for the delay occasioned by Petitioner Riffe's filing for a writ of certiorari herein, for the reason that there appears to be no ground for granting such a writ, and that it has been filed for delay only. This prayer is made under the provisions of Supreme Court Rule 56.4.

Respectfully submitted,

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